Supreme Court, U.S.
FILED
JUL 29 1991
OFFICE OF THE CLERK

(2)

No. 91-20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE TAX COMMISSION OF THE STATE OF MISSOURI, and DIRECTOR OF DEPARTMENT OF REVENUE OF THE STATE OF MISSOURI,

Petitioners,

v.

TRAILER TRAIN COMPANY, RAILBOX COMPANY, and RAILGON COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JAMES W. MCBRIDE
Counsel of Record
ANNE M. STOLEE
LAUGHLIN, HALLE, MCBRIDE, LUNSFORD & FLETCHER
1211 Connecticut Ave., N.W.
Suite 509
Washington, D.C. 20036
(202) 331-8501

Counsel for Respondents

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Respondents restate the Question Presented as follows:

Does Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. §11503, which prohibits the imposition of any tax which results in the discriminatory treatment of common carriers by railroad, prohibit the imposition of a tax on private railcar companies when that tax is not imposed on any other commercial and industrial taxpayers in the State?

LIST OF PARTIES TO THIS PROCEEDING

The Petitioners are the State Tax Commission of the State of Missouri and the Director of the Department of Revenue of the State of Missouri (referred to herein collectively as the "State").

Respondents are Trailer Train Company, Railbox Company, and Railgon Company (referred to herein collectively as "Trailer Train"). Railbox and Railgon are wholly-owned subsidiaries of Trailer Train Company, a Delaware corporation whose shareholders are listed in Appendix A to this brief. As of July 1, 1991, Trailer Train Company has changed its name to TTX Company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES TO THIS PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	2
1. No Special Or Important Reasons Exist for Granting the Writ	3
2. No Conflict Exists among the Circuit Courts, or Between the Decisions Below and Decisions of This Court, on the Issue of Whether the Entire Tax Structure of a State must be Analyzed in Order to Determine Whether a Specific Tax is Discriminatory	6
CONCLUSION	7
APPENDIX A	1a

TABLE OF AUTHORITIES

Page

CASES

Alabama Great Southern Ry. Co. v. Eagerton, 541 F.Supp. 1084 (M.D. Ala. 1982), *on remand from* 663 F.2d 1036 (11th Cir. 1981) 7

Arizona Public Service Co. v. Snead, 441 U.S. 141 (1979) 6

Armco, Inc. v. Hardesty, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed. 540 (1984) 5

Burlington Northern R.R. Co. v. City of Superior, 932 F.2d 1185 (7th Cir. 1991) 3,7

Kansas City Southern Ry. Co. v. McNamara, 817 F.2d 368 (5th Cir. 1987) 4,5,7

MAPCO Ammonia Pipeline, Inc. v. State Board of Equalization and Assessment, Case No. 90-871 (Neb., July 10, 1991) 4

Northern Natural Gas Co. v. State Bd. of Equalization, 232 Neb. 806, 443 N.W.2d 249 (1989), *cert. denied*, ___ U.S. ___ , 110 S.Ct. 1130, 107 L.Ed.2d 1036 (1990) 4

Ogilvie v. State Board of Equalization, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981) 6

Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987) 5

STATUTES

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976) ("Section 306"), now codified at 49 U.S.C. §11503 ..... *passim*

Pub. L. No. 95-473, §3(2), 92 Stat. 1466 (1978) ... 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-20

STATE TAX COMMISSION OF THE STATE OF MISSOURI, and DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF MISSOURI,

Petitioners,

v.

TRAILER TRAIN COMPANY, RAILBOX COMPANY, and RAILGON COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, which is reported at 929 F.2d 1300 (8th Cir. 1991), is reprinted in Appendix A to the Petition. The opinion of the United States District Court for the Western District of Missouri, dated October 27, 1989, is unreported, and is reprinted in Appendix B to the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

STATUTORY PROVISION INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976) ("Section 306"), now codified at 49 U.S.C. §11503.

The language of 49 U.S.C. §11503 as codified differs from the language of Section 306. The codification cannot, however, be construed as making any substantive change to the meaning of Section 306. *See* Pub. L. No. 95-473, §3(2), 92 Stat. 1466 (1978). In the opinions in this case of both courts below, the courts have referred to the language of Section 306 rather than to the language of the codification in resolving issues of statutory construction. Accordingly, Trailer Train will refer to the language of Section 306 in this response. Section 306 is reprinted, in part, in Appendix D to the Petition.

The Missouri Private Car Tax statutes are reprinted in Appendix E to the Petition.

STATEMENT OF THE CASE

Trailer Train is satisfied with the Statement of the Case contained in the Petition.

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 17 of the Rules of this Court. Trailer Train respectfully submits that the Petition should be denied.

1. No Special or Important Reasons Exist for Granting the Writ.

The State makes two arguments, both of which turn on statutory interpretation of Section 306, as to why this Court should accept this case and reverse the ruling of the United States Court of Appeals for the Eighth Circuit. The arguments, however, simply state the State's conviction that the Eighth Circuit's decision was incorrect. The State has been unable to point to any reason that this case presents an issue so special or so important to the public that it should be accepted by this Court, other than that the provisions of Section 306 as interpreted by the Eighth Circuit have "the practical effect of prohibiting virtually any personal property taxation of railroads and carlines and, ultimately, any such taxation of non-railroad public utilities." Petition, page 6.

This complaint is exaggerated and irrelevant.

First, this case involves a gross receipts tax imposed only on railcar companies, and not on any other class of taxpayers. Therefore, it is inexplicable why the State complains that the Eighth Circuit's decision threatens the imposition of personal property taxes by the State.

Second, the State's assertion that under this interpretation of Section 306(1)(d) virtually no tax scheme can be non-discriminatory is simply untrue. Every decision by a United States Court of Appeals interpreting Section 306(1)(d) has made clear that any tax that is imposed generally on other commercial and industrial taxpayers may also be imposed on railroads and railcar companies. *See, e.g., Burlington Northern R.R. Co. v. City of Superior*, 932 F.2d 1185, 1188

(7th Cir. 1991) (state is confined to taxing railroads as members of larger taxpayer groups such as owners of commercial and industrial property or recipients of gross receipts or net income); *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368, 375 (5th Cir. 1987) ("We think the best course is to require that the railroads be taxed only under taxes applicable to 'other commercial and industrial taxpayers' ").

Third, the Nebraska case cited by the State, *Northern Natural Gas Co. v. State Bd. of Equalization*, 232 Neb. 806, 443 N.W.2d 249, *cert. denied*, ___ U.S. ___, 110 S.Ct. 1130, 107 L.Ed.2d 1036 (1990), turned on an issue of Nebraska constitutional law and is therefore not relevant to this proceeding.[1] There is no record here of any similar state constitutional issues in Missouri. The State's reliance upon hypothetical state constitutional consequences blurs the federal question presented and underscores the lack of a proper basis for certiorari.

The State alleges that the district court's holding means that a state can never rebut the presumption of discrimination that arises from the imposition of a specialized tax on railroads or railcar companies. This is again untrue. In *Kansas City Southern*, the Fifth Circuit stated that:

---

[1] *See* Hellerstein, *Equal Protection Run Amok?: An Analysis of the Nebraska Supreme Court's Decision in the Northern Natural Gas Case*, Tax Notes, November 20, 1989. In any event, the continued validity of the *Northern Natural Gas* decision has now been placed in doubt by a new decision of the Nebraska Supreme Court, *MAPCO Ammonia Pipeline, Inc. v. State Board of Equalization and Assessment*, Case No. 90-871 (Neb., July 10, 1991).

> It may be that in an appropriate case we would allow the state to save a facially discriminatory tax by showing that it is *necessary* to "compensate" for some state or local tax—a tax applicable to "other commercial and industrial" taxpayers—that for some reason *cannot* be levied against the railroads.

817 F.2d at 376 [emphasis in original]. The Fifth Circuit also stated that once a Section 306 plaintiff has proved a prima facie case of discriminatory taxation, the burden shifts to the state to prove that the facially discriminatory tax is justified. *Id.*

This case was decided on Trailer Train's motion for summary judgment, in which Trailer Train proved that the tax was facially discriminatory. The State then had a full opportunity to make the showing of necessity suggested by the Fifth Circuit, but it failed to do so. Instead of trying to show why it might need to impose a specialized tax only on private railcar companies, the State tried to find some other tax that might be comparable to the gross receipts tax at issue. As did the State of Louisiana in the *Kansas City Southern* case, the State urged that the use tax was comparable to the gross receipts tax at issue. That tax is clearly not comparable to the gross receipts tax because the bases of the two taxes are substantially different. *Cf. Armco, Inc. v. Hardesty*, 467 U.S. 638, 642-43, 104 S.Ct. 2620, 2623, 81 L.Ed. 540 (1984); *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987).

The State was given a full opportunity in briefing the motion for summary judgment to rebut the discriminatory nature of the private car tax, and it failed

to do so. This case therefore presents no special or important reason for the granting of a writ of certiorari.

2. No Conflict Exists among the Circuit Courts, or between the Decisions Below and Decisions of This Court, on the Issue of Whether the Entire Tax Structure of a State Must be Analyzed in Order to Determine Whether a Specific Tax is Discriminatory.

The State wisely does not assert conflict as a ground for this Court to grant certiorari, since there has been virtual unanimity among the Circuit Courts that have interpreted Section 306(1)(d). The State does seem to argue, however, that the district court should have examined other taxes paid by other classes of taxpayers in order to determine whether this gross receipts tax is discriminatory, and this argument directly contradicts the holdings of the United States Courts of Appeal and this Court.

The Eighth Circuit held in this case that "under the 4-R Act it is not within our discretion to analyze the disputed tax in the context of Missouri's overall tax structure." 929 F.2d at 1303; Petition, Appendix A, page A-5. This holding was based on the Eighth Circuit's earlier decision in *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981), and on the decision of this Court in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), which concerned a federal statute prohibiting taxes on electricity that were discriminatory against out-of-state consumers. In *Snead*, this Court stated:

> To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to

> be faithful not only to the language of that statute but also to the expressed interest of Congress in enacting it. Because the tax . . . *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute.

441 U.S. at 149-50 [emphasis in original].

This holding, that the analysis of a court in determining whether a tax violates Section 306 must be focussed on the tax itself and not on the overall tax structure of the state, has also been upheld by the Fifth Circuit in *Kansas City Southern*, *supra*; and by the Seventh Circuit in *Burlington Northern v. City of Superior*, *supra*. In addition, this ruling has been made by the District Court for the Middle District of Alabama on remand from the Eleventh Circuit. *Alabama Great Southern Ry. Co. v. Eagerton*, 541 F.Supp. 1084 (M.D. Ala. 1982), *on remand from* 663 F.2d 1036 (11th Cir. 1981). There is no authority to the contrary.

CONCLUSION

Although Section 306 is important legislation, the issues raised in this case do not warrant review by this Court. The courts below applied this statute precisely as it is written and with the results intended by Congress. The petition does not present any ground for granting certiorari within the meaning of Rule 17 of the Rules of this Court and should be denied.

Respectfully submitted,

JAMES W. MCBRIDE
Counsel of Record
ANNE M. STOLEE
LAUGHLIN, HALLE, MCBRIDE,
LUNSFORD & FLETCHER
1211 Connecticut Ave., N.W.
Suite 509
Washington, D.C. 20036
(202) 331-8501

APPENDIX

APPENDIX A

SHAREHOLDERS IN TTX COMPANY

ATCHISON, TOPEKA & SANTA FE RY CO.

BOSTON AND MAINE CORP.

BURLINGTON NORTHERN R.R. CO.

CENTRAL OF GEORGIA R.R. CO.

CHICAGO AND NORTH WESTERN TRANSPORTATION CO.

CONSOLIDATED RAIL CORP.

CSX TRANSPORTATION, INC.

DENVER & RIO GRANDE WESTERN R.R. CO.

FLORIDA EAST COAST RY. CO.

GRAND TRUNK WESTERN R.R. CO.

ILLINOIS CENTRAL R.R. CO.

KANSAS CITY SOUTHERN RY. CO.

MISSOURI PACIFIC R.R. CO.

NORFOLK SOUTHERN RY. CO.

NORFOLK & WESTERN RY. CO.

RICHMOND, FREDERICKSBURG & POTOMAC R.R. CO.

ST. LOUIS SOUTHWESTERN RY. CO.

SOO LINE R.R. CO.

SOUTHERN PACIFIC TRANSPORTATION CO.

STARR HOLDING CORP.

UNION PACIFIC R.R. CO.